IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23484/18

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA Applicant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

27/11/18
DATE

SIGNATURE

and

SIYAYA SIYAYA DB (PTY) LIMITED First Respondent

SIYAYA SIYAYA RAIL (PTY) LIMITED Second Respondent

SHERIFF: PRETORIA EAST Third Respondent

JOHANNES ZACHARIAS MULLER Fourth Respondent

TSHIFHIWA PERSEVERANCE MUDZUS Fifth Respondent

MASTER OF THE HIGH COURT, PRETORIA Sixth Respondent

JUDGMENT

Tuchten J:

1 The applicant (PRASA) is a state owned entity. It holds certain of the state's transport assets, including the passenger rail service which it operates. PRASA has for some time been engaged in litigation with

entities, apparently controlled by Mr Makhensa Mabunda, all or some of which have the word *Siyaya* in their names. It is unnecessary for present purposes to distinguish between the individual Siyaya entities; so I shall group them under the name Siyaya or the Siyaya entities.

2 The Siyaya entities claim that PRASA owes them some very considerable amounts, totalling almost R60 million exclusive of interest, for services rendered. They sued PRASA in four separate cases in this court. PRASA defended. One of the defences raised in al the cases was that the parties had agreed to arbitrate their disputes. By agreement, the four cases were submitted to retired judge FDJ Brand (the Arbitrator) for arbitration.

3 The arbitrations were predictably opposed. The parties to the arbitration exchanged documents and sought to enforce procedural obligations which it was alleged had been neglected.

4 Advocate TAN Makhubela SC was according to the papers appointed a judge of the High Court during October 2017. But, again according to the papers, on 19 October 2017, *after* she had been appointed a judge. Adv Makhubela (to whom I shall now refer as Judge Makhubela) accepted an appointment as the chair of the PRASA

interim board. She resigned that position, again according to the papers in the rescission application, with effect from 16 March 2018.

5 Litigation on behalf of PRASA is conducted by an internal organ called Group Legal Services (GLS). The GLS had been conducting the litigation against Siyaya. But for reasons which have apparently not to date been explained, Judge Makhubela assumed a prominent role in the litigation. This culminated in an instruction to PRASA's attorneys to settle the claims by paying capital and interest at 9% from 16 January 2018. This was done and the Arbitrator made awards to that effect.

6 All this was done against the strong opposition of a grouping of officials within PRASA which maintained that the claims ought to be resisted. According to the deponents to affidavits before me, Judge Makhubela gave instructions that members of the GLS, the very organ created to conduct PRASA litigation, who had considerable knowledge of the Siyaya litigation, were to be excluded from any participation in the further conduct of the case. Indeed, when the second most senior member of GLS, Mr MM Dingiswayo, tried to discuss the matter with PRASA's attorney, Mr Mogashoa, on 15 December 2017, Mr Mogashoa told Mr Dingiswayo that Judge Makhubela had barred PRASA's attorneys from interacting with GLS on the case.

7 By notice of motion dated 21 February 2018, the Siyaya entities applied (the enforcement applications) to this court to make the several arbitral awards orders of court. On 5 March 2018, officials within PRASA opposed to payment learnt of the existence of the enforcement applications. On 6 March 2018, those officials instructed attorneys Bowman Gilfillan (BG) to oppose the enforcement applications in PRASA's name. BG gave notice of PRASA's intention to oppose the applications on the same day.

8 PRASA was represented by both an attorney and counsel when the enforcement applications came before Holland-Muter AJ. The Siyaya entities had earlier challenged BG's authority to act under rule 7(1). Troublingly, it is alleged by the GLS officials that Siyaya challenged BG's authority on the strength of information supplied to them by Judge Makhubela herself and were in possession of at least one letter which ought to have enjoyed confidentiality as being a communication between attorney and client.

9 BG put up a power of attorney granted by PRASA's "Head of Legal", ie the head of the GLS, vested with the delegated authority to appoint lawyers to act for PRASA in litigation. But this was rejected by Holland-Muter AJ who concluded that the attempt to confer authority on BG had been ineffectual. Holland-Muter AJ then refused PRASA

a postponement to correct the perceived deficiency and granted judgment according to the tenor of the arbitral awards.

10 Thus the present application (the rescission application): to set aside the orders of Holland-Muter AJ made on 9 March 2018. The rescission application was preceded by an urgent application. This was made necessary by the fact that the Siyaya entities executed on the Holland-Muter orders. Fortunately for the administration of justice and good governance, the sheriff held the monies attached in his own bank account. This enabled PRASA urgently to apply to stay the paying out of the monies attached at the instance of the Siyaya entities. If that had happened, the monies would probably have been lost to the public purse. But on 6 April 2018, Ranchod J interdicted the paying over of the monies, despite the opposition of the Siyaya entities. According to PRASA, R56 029 560,95 was seized by the sheriff from PRASA's bank account.

11 The present application is for the rescission of the Holland-Muter orders and the repayment to PRASA of the monies attached under rule 42(1) on the ground that the orders were erroneously sought and granted. It is not opposed. PRASA's papers show signs of having been drawn in desperate haste. This is not a criticism. I think those responsible for drafting the papers did a good job under the

circumstances. But there are areas where further interrogation of the facts is required. I am also not undertaking an exhaustive analysis of the facts because the present application is merely interlocutory to a hearing of the enforcement applications.

12 What is clear, however, is that Holland-Muter AJ erred in concluding that BG were not authorised to act for PRASA. They were. They represent PRASA in the present application. Their authority was conferred by the head of the GLS, the very person who had given authority for BG to represent PRASA in the enforcement applications.

13 But even if there had been a defect in the authorisation of BG to represent PRASA in the enforcement applications, I find the decision to deny PRASA, or BG, the opportunity to remedy the defect startling. The decision to grant judgment there and then meant that PRASA had been potentially denied a fair hearing. It ought to have taken little imagination to grasp that two factions had arisen within PRASA: one desired that payment be made; the other desired that payment not be made. It is vital that a court determine who is right. A very large sum of public money was involved. A short postponement would have caused no prejudice. The prejudice to PRASA, and the people of this country, if the postponement were refused, could have been substantial.

14 PRASA makes the case in the papers before me that the settlements before the Arbitrator were unauthorised, that the process by which this was achieved constituted financial misconduct and that the facts pointed to a questionable relationship between "role players including an official or officials who are supposed to act in the best interests of PRASA and the Siyaya entities".

15 I find that case established for present purposes. So rescission must issue. This does not mean that the court has made a final decision on matter. My decision is, I repeat, interlocutory to the enforcement applications which must now proceed on their merits.

16 I must mention too that according to a draft notice of motion and correspondence in the present papers, an organisation which calls itself #Unite Behind and says that it is a coalition of people's organisations and legal, policy, research and support bodies advocating for social justice and equality, is challenging in the Cape Town High Court the execution of the enforcement orders and the power of the interim board of PRASA to institute, defend or settle legal proceedings or claims against one of the Siyaya entities. The papers in the rescission application do not disclose what has transpired in the Cape Town proceedings.

17 I am sorry to say that I must say something about the conduct of Judge Makhubela as evidenced by these papers. There are questions which demand answers: Did she disclose in her application for judicial appointment that she was considering taking up an appointment as PRASA chair which would prevent her from performing the duties of a judge until she gave up her position at PRASA? Why did she accept the appointment to chair PRASA when she had already been appointed a judge? Why did she intervene at all in the litigation with Siyaya? Did she sideline the GLS from participation in the litigation and the settlement and, if so, why? Did she supply Siyaya with information which they could use against PRASA and, if so, why? In general, did she act with propriety in relation to the Siyaya litigation?

18 This brings me to a further concern. According to a memorandum written in her name which is before me, Judge Makhubela mentioned at an early stage of her intervention in the Siyaya litigation that she was in possession of a report arising from an insolvency enquiry into the affairs of one of the Siyaya entities. It seems that the contents of this alleged report were, according to her, central to her decision to intervene in the Siyaya litigation. In PRASA's founding affidavit in the rescission application, PRASA asserts that the GLS officials have never been furnished with such a report, despite their requests. They say that none of the evidence adduced at the insolvency enquiry

impacted upon PRASA's case in the Siyaya litigation. Does such a report exist? If it does, who compiled it and what does it say?

19 At no stage of the proceedings has Judge Makhubela made an affidavit or otherwise communicated her version in response to the allegations of the GLS officials in the rescission application. She has had at least two opportunities to do so: when the urgent application was adjudicated and in response to the present application. The alleged insolvency enquiry report was never put before the court.

20 Judge Makhubela will have a further opportunity to present her side of the story when the applications for enforcement are argued. Of course it does not necessarily follow that a decision on the enforcement applications, one way or the other, will be dispositive of the concerns in relation to Judge Makhubela's conduct. If, objectively, the adjudication of the enforcement applications is not an appropriate forum for her side of the story to be received and considered, another forum ought to be provided to her for this purpose. But I must express my firm view that Judge Makhubela ought not to undertake any judicial duties until she clears her name of the allegations against her.

21 Because the present application is interlocutory, I shall reserve the costs for later determination.

22 I make the following order:

1 The judgments and orders granted by this court per Holland-Muter AJ on 9 March 2018 under case numbers 2015/73933, 2015/73934, 2016/47597 and 2016/47598 are hereby rescinded and set aside.

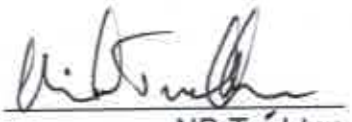
2 The warrants of execution issued under the above four case numbers are hereby set aside.

3 The third respondent is directed to pay the sum of R56 029 560,95 attached by him together with the interest that has accrued thereon, calculated from the date the funds were paid into the third respondent's bank account until date of payment, into the applicant's bank account held with the Standard Bank of South Africa Limited under account number 202610241 within five days of receipt by the third respondent of this order.

4 The notices of intention to oppose the main application, served by the applicant on 6 March 2018 will stand as notices to oppose the applications to enforce the arbitral awards.

5 The applicant must deliver its answering affidavits, if any, in the applications to enforce the arbitral awards by 18 January 2019.

6 The costs incurred to date are reserved for later determination.



NB Tuchten
Judge of the High Court
27 November 2018

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